Supreme Court, U.S.
FILED
MAR 2 - 2000
CLERK

(2)

No. 99-1287

IN THE

Supreme Court of the United States

MITSUBISHI ELECTRIC CORPORATION,

Petitioner,

v.

AMPEX CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT

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ABBREVIATIONS

In this brief, the following abbreviations and format are used:

Mitsubishi	Petitioner, Mitsubishi Electric Corporation
Ampex	Respondent, Ampex Corporation
'533 patent	U.S. Patent No. 4,665,533
A___	Citation to the Joint Appendix on appeal (referred to pursuant to Supreme Ct. Rule 12.7)
A343, *121:21-122:7*	Example of citation to trial transcript (at page 343 of the Appeal Appendix: transcript page 121, line 21 through page 122, line 7) (referred to pursuant to Supreme Ct. Rule 12.7)
A-Br. ___	Citation to the corresponding page of the Brief for Appellee, Ampex Corporation, filed in the Federal Circuit appeal (referred to pursuant to Supreme Ct. Rule 12.7)
M-Pet. ___	Citation to the corresponding page of Petitioner Mitsubishi Electric Corporation's Petition for a Writ of Certiorari

Abbreviations

App. ___	Citation to the corresponding page of the Appendices accompanying Petitioner Mitsubishi Electric Corporation's Petition for a Writ of Certiorari

STATEMENT OF THE CASE

Mitsubishi's Petition for a Writ of Certiorari should be denied. The issue presented by Mitsubishi's Petition is a straightforward example of a party not only waiving its right to assert an alleged ground for a new trial, but also inviting the Trial Court to take the very action of which it now complains. Mitsubishi's attacks on the Federal Circuit's Opinion as "remarkable," "bizarre" and "dangerous" (M-Pet. 2, 7, 12) should be summarily rejected.

As stated in this Court's Rule 10:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. . . .
>
> * * * *
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Contrary to Mitsubishi's characterization of the Federal Circuit's decision, it is not contrary to this Court's precedent, in conflict with the law of any other Circuit, a retroactive imposition of new law, nor even a misapplication of the properly stated law of this Court.

The Federal Circuit not only properly stated, but also properly applied, this Court's "multiple-claims-single-verdict" ground for new trial. As the Federal Circuit

recognized (App. 6a-7a), the applicable law of this Court includes *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 82 S. Ct. 1130, 8 L. Ed. 2d 305 (1962) and *Maryland v. Baldwin*, 112 U.S. 490, 5 S. Ct. 278, 28 L. Ed. 822 (1884). As the Federal Circuit correctly summarized (App. 6a):

> The Supreme Court has ruled that when liability is argued to the jury on alternate legal theories, one of which is not legally correct or is not a permissible jury question, a general verdict of liability can not stand lest it have been based on the incorrect or impermissible theory.[1]

The Federal Circuit then went on to hold that Mitsubishi had waived the right to invoke the multiple-claims-single-verdict ground for new trial, by failing to timely object to the verdict form (App. 8a). Mitsubishi's attack on the Federal Circuit's waiver holding is particularly inappropriate given that Mitsubishi not only acquiesced in, but encouraged, the use of the verdict form that Mitsubishi attacks. That form had a single question on validity. The Trial Court's rejection of Mitsubishi's first proposed verdict form was not because it had separate questions on anticipation and obviousness.[2] It was Mitsubishi's decision, not any requirement of the Trial Court, to drop the separate questions and submit instead only a single question on validity. Moreover, Mitsubishi declined to join with Ampex, when Ampex proposed the form of verdict Mitsubishi now says should have been used. Only after it lost the jury verdict and a jury had been discharged

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1. The Federal Circuit also correctly stated that this principle is applied to multiple claims as well as multiple theories (App. 7a).

2. As discussed *infra*, even Mitsubishi's original form left out any separate question on indefiniteness.

did Mitsubishi complain that the verdict form does not reveal whether the jury reached its verdict based on all or less than all of the grounds submitted to it. This hardly presents a case that merits a Writ of Certiorari from this Court.

Moreover, far from being "[c]ontrary to more than 100 years of precedent of this Court," or "in conflict with . . . prior decisions of this Court" (M-Pet. 2), the Federal Circuit's holding is in accord with longstanding authority that the Seventh Amendment right to a jury trial may be waived if not properly invoked. There is no hint in *Sunkist, Baldwin*, or any other holding of this Court that waiver would apply any differently to the Seventh Amendment implications of the multiple-claims-single-verdict ground, than waiver applies to any other aspect of Seventh Amendment jurisprudence.

In addition, the Federal Circuit's waiver holding in no way "retroactively imposed [a] new requirement" on Mitsubishi (M-Pet. 2). To the contrary, the precedent of the two Circuits with a stake in this action — the Federal Circuit and the Ninth Circuit — squarely provides for waiver under the circumstances present in this case. The Federal Circuit's holding that Mitsubishi waived any right to rely on a multiple-claims-single-verdict ground for review or new trial was a routine application of this well established precedent. And Mitsubishi's reliance on the Seventh Circuit decision *Royal Typewriter*, as supposedly in conflict with the Federal Circuit's holding, is misplaced.[3]

Mitsubishi further argues against the Federal Circuit's waiver holding on the incorrect premise that it somehow

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3. *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092 (11th Cir. 1983) (M-Pet. 8).

conflicts with the law that a Trial Court has broad discretion in decisions concerning the verdict form. (M-Pet. 3). But this law, as uniformly followed in the respective Circuits, provides that the Trial Court's decisions concerning the verdict form are reviewable for abuse of discretion, and further holds that any objection to the Trial Court's decisions are waived if not timely raised. Thus, this law supports the Federal Circuit's holding of waiver.

Mitsubishi's assertion that somehow the Federal Circuit's ruling "impairs the right to trial by jury under the Seventh Amendment" (M-Pet. 3) turns the issue here on its head. It is Mitsubishi that is attempting to vitiate a jury verdict soundly based on fact and law, by urging a purported flaw in the verdict form which Mitsubishi itself created. It is Mitsubishi that attempts to now deprive Ampex of the jury's verdict. As this Court has held in analogous circumstances, likewise rejecting assertions that the right to a jury trial under the Constitution was impinged: "the alleged defect here is not that a jury determination was denied but rather that a jury determination was permitted."[4] There is no curtailment of Seventh Amendment rights when a party waives an objection to some aspect of how issues were presented to the jury. That is true whether the aspect involved is jury instructions, evidence admitted, issues put to the jury, or, as here, the specificity of a jury verdict form.

Mitsubishi also predicts that the Federal Circuit's decision "creates an open invitation for trial courts to favor the use of general verdict forms" that will "stimulat[e] the

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4. *Griffin v. United States*, 502 U.S. 46, 48, 112 S. Ct. 466, 469, 116 L. Ed. 2d 371 (1991). *Griffin* was a criminal case and concerned the analogous jury trial right under the Sixth Amendment. *Id.*

use of general verdicts" (M-Pet. 4). Not so. The rule that the multiple-claims-single-verdict ground for new trial is waived if not timely objected to discourages parties like Mitsubishi from taking a "wait and see" approach to errors they perceive in the verdict form. By requiring a party to object in a timely manner, the Trial Court has the opportunity to adopt a more specific verdict form, if warranted, thus avoiding the very problem that Mitsubishi purports to be concerned about. On the other hand, if Mitsubishi had its way, parties would be encouraged to hold back objections, allow the supposedly inadequate general form to be used, remain silent until after discharge of the jury, and then force an expensive, wasteful new trial if the verdict does not favor them.

Finally, Mitsubishi incorrectly assumes that, in this case, not all grounds for invalidity were supported. To the contrary, the Federal Circuit found, in upholding the Trial Court's judgment, that "Mitsubishi . . . has not shown that any ground of invalidity was improperly presented for jury verdict" (App. 7a). After concluding that Mitsubishi had waived its new trial ground, the Federal Circuit noted that "[n]onetheless, we have reviewed the evidentiary basis for issues on which Mitsubishi relies in its argument that there was not substantial evidence to support the jury verdict" (App. 8a-9a).

Thus, contrary to Mitsubishi's characterization, the Federal Circuit did ***not*** hold that a general verdict should be upheld "if any *one* theory is supported by substantial evidence" (M-Pet. 3). Rather, the Federal Circuit held that Mitsubishi ***waived*** invocation of the multiple-claims-single-

verdict ground for a new trial, and that all invalidity grounds were supported, in any event.[5]

REASONS FOR DENYING THE WRIT

I. MITSUBISHI NOT ONLY WAIVED ITS RIGHT TO COMPLAIN THAT THE VERDICT FORM WAS TOO GENERAL, IT INVITED THE VERY ERROR ABOUT WHICH IT NOW COMPLAINS

As is common in patent cases, the Trial Court here provided the jury with a special verdict form that asked the

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5. The Federal Circuit's holding that "Mitsubishi . . . has not shown that any ground of invalidity was improperly presented for jury verdict" (App. 7a), applies to both patents. Mitsubishi's Petition makes clear that it only relates to one of the two patents-in-suit, the '533 patent (M-Pet. 5). The Federal Circuit specifically discussed one of Ampex's three invalidity defenses to the '533 patent (the obviousness defense), and stated that "[w]e thus do not reach the other grounds of invalidity" (App. 29a).

Mitsubishi's Petition refers particularly to the '533 indefiniteness ground for invalidity (M-Pet. 5, n.2). Mitsubishi never submitted a verdict form that included a question on indefiniteness. Moreover, as demonstrated in Ampex's Appeal Brief, there was no error in submitting indefiniteness to the jury, and the jury's invalidity verdict is amply supported by the evidence on indefiniteness (A-Br. 23-29). *Bio-Rad Lab., Inc. v. Nicolet Instrument Corp.*, 739 F.2d 604, 613 (Fed. Cir. 1984), *overruled on other grounds by Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 977 (Fed. Cir. 1995); *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1576 (Fed. Cir. 1986). Mitsubishi errs in asserting that its position was somehow "proven correct" by the Federal Circuit's holding in *Atmel Corp. v. Information Storage Devices, Inc.*, 198 F.3d 1374 (Fed. Cir. 1999). That case merely held that indefiniteness is a question of law, and in no way conflicts with the ample precedent that indefiniteness may be tried to the jury.

jury whether Ampex had proved each patent in suit invalid by clear and convincing evidence and whether Mitsubishi had proven infringement by a preponderance of the evidence.[6] As is also typical, Ampex's invalidity defense as to each patent was based on more than one ground of invalidity. For the '533 patent, Ampex raised anticipation, obviousness and indefiniteness defenses. After the jury found both its patents invalid, and after the jury was discharged, Mitsubishi raised for the first time in its post-trial motions its multiple-claims-single-verdict argument as grounds for a new trial. As the Federal Circuit explained (App. 6a):

> Mitsubishi states that if any one of these three grounds was erroneously submitted for jury verdict, the verdict must be vacated and a new trial granted because it is not possible for the appellate court to know whether the verdict was founded on the ground that was submitted in error.

Having explained the principle, the Federal Circuit explained why it did not apply here. First, because Mitsubishi waived the right to raise any such issue by failing to object to — indeed it proposed — the verdict form used by the Trial Court; and second, because Ampex submitted substantial evidence to support each of its grounds for invalidity (App. 7a-9a).

Mitsubishi's "Prior Proceedings" section of its Petition obscures these basic facts (M-Pet. 5-7). Contrary to Mitsubishi's version of the events below, Mitsubishi proposed the special verdict form that it now asserts did not

6. Mitsubishi's proposed verdict form, and the final form used by the Trial Court, were entitled "Special Verdict" (App. 32a; A857 (D.I. 602); A12823-24). The Trial Court instructed the jury that it was being given a special verdict (A518, *101:10-13, 103:9-10*).

reveal the grounds for the jury's verdict, thus creating the very problem of which it now complains.

Mitsubishi incorrectly characterizes the jury form that was used by the Trial Court as "Ampex's general verdict form" (M-Pet. 5). In fact Mitsubishi submitted the proposed form, with a single question directed to validity, that in all pertinent respects is the form filled out by the jury (App. 32a-37a; A12823-27). As Mitsubishi's counsel told the Trial Court below (A505, *51:9-10*):

> [T]his [form] is basically something I wrote and [was] slightly modified by the other side.

This final form that Mitsubishi proposed, adopted by the Trial Court, was the culmination of Mitsubishi's consistent approach to the jury verdict form, and was in contrast to Ampex's approach, which itemized the various grounds for Ampex's invalidity defense.

Mitsubishi first submitted a form which included a special verdict on anticipation and obviousness of the '533 patent, but included nothing on Ampex's argument that the '533 patent claim was indefinite — the very ground it now complains was not included in the final verdict form (M-Pet. 5, n.2; A7996-8000).[7] In contrast, Ampex's proposed

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7. Under the circumstances here, despite Mitsubishi's suggestion otherwise, this does not come close to satisfying the requirements of Fed. R. Civ. P. 46, requiring a party to make known to the Court any objection in order to preserve that objection. (M-Pet. 6, n. 4). *Transamerica Premier Ins. Co. v. Ober*, 107 F.3d 925, 933 (1st Cir. 1997) (objection to special verdict form waived, notwithstanding that party proposed an alternative verdict form); (Cont'd)

verdict form required the jury to explicitly set out its verdict on each of Ampex's invalidity grounds, including anticipation, obviousness and indefiniteness (Docket Item 585, listed at A855).

During trial, the Court stated its preference for the order of issues in Mitsubishi's proposed form, but also cautioned the parties against the use of a general verdict in patent cases (App. 8a; A489-90, *154:1-155:10*). Mitsubishi then submitted its final proposed form, which voluntarily eliminated the separate questions on anticipation and obviousness and included only a single question on validity (A12823-27).

Mitsubishi's decision to change the proposed jury form to include a single question on validity was its own decision, not a requirement of the Trial Court. Mitsubishi never objected to any lack of itemization in the jury verdict form, that Mitsubishi itself proposed, and which the Trial Court adopted at Mitsubishi's urging. Even after the Trial Court, in its discretion, ruled that the indefiniteness issue would be decided by the jury (A470-71, *77:22-79:16*), Mitsubishi made no attempt to include in the jury form a special verdict question on indefiniteness. Nor did Mitsubishi suggest, until its post-trial motions brought after the jury was dismissed, that the jury verdict might be challengeable on a multiple-claims-single-verdict ground, based on the alleged generality of the jury form.[8]

(Cont'd)
Neu v. Grant, 548 F.2d 281, 287 (10th Cir. 1977) ("An appellant may not complain on appeal of errors which he himself induced or invited.").

8. After the jury returned its verdict, but before it was discharged, Mitsubishi could have requested that the Trial Court submit an amended verdict form if it wanted clarification of the

(Cont'd)

Whether Mitsubishi's actions are viewed as waiver or as the cause of the very action by the Trial Court about which it now complains, Mitsubishi is in no position to urge that Ampex now be deprived of the jury's verdict of invalidity.

II. THE FEDERAL CIRCUIT'S HOLDING OF WAIVER IS BASED ON SOUND PRECEDENT

Mitsubishi asserts that the Federal Circuit's waiver holding was "never previously imposed by this or any other federal court" (M-Pet. 2, also M-Pet. 7). Mitsubishi is incorrect. There is ample precedent in the Circuits for requiring a party to object to the form of verdict as a prerequisite to invoking the multiple-claims-single-verdict ground for review and a new trial. Also, notwithstanding Mitsubishi's unsupported assertions, there is nothing in *Sunkist, Baldwin*, or any other holding of this Court that in any way conflicts with the precedents that were followed here. Mitsubishi thus has no justification for asserting that it "understood that" it could invoke the multiple-claims-single-verdict ground notwithstanding that it failed to object to the lack of specificity of the jury form (M-Pet. 8). The waiver rule has been well established — especially in circumstances such as these, where the waiving party invited the Court to use the very verdict form it subsequently objects to.

(Cont'd)
grounds for the verdict. It did not. *Hupp v. Siroflex of Am., Inc.*, 122 F.3d 1456, 1464 (Fed. Cir. 1997); *Mateyko v. Felix*, 924 F.2d 824, 827 (9th Cir. 1991); *Larson v. Neimi*, 9 F.3d 1397, 1401 (9th Cir. 1993).

A. The Federal Circuit Waiver Authorities

Hoechst Celanese Corp. v. BP Chems. Ltd., 78 F.3d 1575 (Fed. Cir. 1996), on which the Federal Circuit relied (App. 8a), is precisely on point. There, the jury was presented with a single question on infringement. The patentee had asserted infringement liability on two theories: literal infringement and infringement under the doctrine of equivalents. The defendant/appellant had objected that it was improper to present the doctrine of equivalents issue to the jury and had proposed a verdict form with only a single question on infringement. The Trial Court adopted the defendant's form. When apprised that equivalents would be presented to the jury, defendant/appellant did not propose that a question regarding equivalents be added to the form or object to the form. After the jury found infringement, defendant/appellant moved for a new trial, arguing that (*Hoechst*, 78 F.3d at 1581):

> [A] new trial is required because the jury was not asked to distinguish between literal infringement and infringement by equivalency. [The defendant] states that because it is possible that the jury relied on an inapplicable theory of infringement, the verdict must be discarded.

The Federal Circuit rejected that argument in terms directly applicable here (*id.*):

> [Plaintiff] had proposed the submission to the jury of separate questions on literal infringement and infringement by equivalency, while [defendant] did not propose separate questions. The judge selected the [defendant's] form of

> verdict. The specificity of the verdict is within the discretion of the trial judge. [Defendant] concedes that it had proposed the form of the verdict that was used, and states that the reason it did not propose a separate question on equivalency was because of its position that equivalency was an equitable matter and not for the jury. However, [defendant] was fully apprised that the jury was instructed on infringement by equivalency, and that the issue had been presented by witnesses at trial. . . .
>
> ***[Defendant] by its acquiescence in and indeed by its proposal of the verdict form waived objection to the verdict form.***

(Emphasis supplied, citations omitted). The Federal Circuit thus specifically noted that "the specificity of the verdict is within the discretion of the trial judge" and then went on to hold that the defendant had waived any reliance on a multiple-claims-single-verdict ground on appeal.

Mitsubishi, like the defendant/appellant in *Hoechst*, proposed the verdict form used by the Trial Court, failed to object to that form, and remained silent concerning the form until it was too late for the other party or the Trial Court to do anything about it.

The Federal Circuit's ruling in *Weinar v. Rollform, Inc.*, 744 F.2d 797 (Fed. Cir. 1984), also is precedent for the Federal Circuit's waiver holding. Just as was done here, a jury verdict form was used which only required the jury to determine whether the patent in suit was valid or invalid. The jury found the patent invalid, and the patentee, just as Mitsubishi does here, argued that it was impossible to know

on which ground the invalidity verdict was based. The Federal Circuit rejected the argument, noting the appellant's failure to object to the non-itemized form used by the Trial Court. The Federal Circuit held that any objection which the patentee may have had was waived and was "invited error," because the appellant had proposed the non-itemized jury form. *Id.* at 809.

B. Ninth Circuit Authority Also Supports Waiver

The Federal Circuit's Opinion also looked to the applicable precedent of the Ninth Circuit, the Regional Circuit from which this appeal arose (App. 8a).[9] In particular, the Federal Circuit correctly relied on *McCord v. Maguire*, 873 F.2d 1271, *amended by* 885 F.2d 650 (9th Cir. 1989). In *McCord*, plaintiff brought a negligence action based on eight different theories of liability. After a general verdict finding negligence, the defendant/appellant sought a new trial, arguing that four of the eight negligence grounds lacked evidentiary support. The Ninth Circuit rejected this argument for two independent grounds. First, the Court applied a Ninth Circuit exception to the *Sunkist* multiple-claims-single-verdict rule, to the effect that if the verdict rested on multiple alternative factual grounds (as opposed to alternative legal theories), then the verdict would stand if any one factual basis had sufficient evidentiary support. *McCord*, 873 F.2d at 1273-74.

Importantly, however, the Ninth Circuit also relied on an independent ground to reject the new trial application: that the appellant ***waived*** the right to argue the multiple-

9. *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1574-75 (Fed. Cir. 1984) (law of the Regional Circuit applies to procedural issues which are not unique to patent law).

claims-single-verdict basis for a new trial because it had not requested a special verdict that itemized each negligence ground. The Ninth Circuit held, in terms especially apposite here (*McCord*, 873 F.2d at 1274):

> Litigants . . . who wish to challenge the sufficiency of evidence as to some, but not all, specifications of negligence must present an appropriate record for review by asking the jury to make separate factual determinations as to each specification. Any other rule would unnecessarily jeopardize jury verdicts that are otherwise fully supported by the record on the mere theoretical possibility that the jury based its decision on unsupported specifications. We will not allow litigants to play procedural brinkmanship with the jury system and take advantage of uncertainties they could well have avoided.

Here, Mitsubishi also resorted to just such "procedural brinkmanship." Instead of properly objecting to the verdict form used by the Trial Court, it proposed that form, and then sat back and waited to see whether or not the jury would rule in its favor. When the jury returned its verdict of invalidity, Mitsubishi still kept silent, rather than asking for a more particularized itemization of the invalidity grounds before the jury was discharged. Only after it was too late did Mitsubishi seek to address the perceived problem, by demanding a new trial. Mitsubishi's Petition should be denied for the same reason as in *McCord*: Mitsubishi has waived the right to challenge the sufficiency of some, but not all, of the grounds for invalidity.

In the face of this extensive precedent, Mitsubishi glibly asserts that the "only reported decision" on point is in ***its***

favor: *Royal Typewriter*, 719 F.2d at 1098-99. Mitsubishi relies on *Royal Typewriter* as supposedly "flatly reject[ing] the proposition" that "the standard of review required by *Sunkist* can be waived" (M-Pet. 8). Not so — that issue was not before the Court in *Royal Typewriter*. Rather, the Court rejected an argument that the appellant should not have been allowed to rely on the multiple-claims-single-verdict rule because it had forced the Court below to adopt a general verdict by proposing a special verdict form that was too complicated. There was no issue or discussion of waiver as a result of failing to object to the verdict form used, or failing to call to the Court's attention the problem that the general verdict form might present on appeal. *Royal Typewriter* has no applicability to the waiver issue presented here.

C. The Federal Circuit's Waiver Holding Is Soundly Based On Policy

Mitsubishi tries to avoid these precedents by positing that it isn't really objecting to the jury form, but rather is merely invoking a standard of review for verdicts based on multiple theories. The Federal Circuit saw through this semantic game, and soundly rejected it (App. 8a). There is no distinction between the circumstances here and those of *Hoechst*, *Weinar* or *McCord*. In substance, the effect of Mitsubishi's invocation of the multiple-claims-single-verdict ground for new trial is an objection to the specificity of the jury form, which objection is waived if not timely raised.

Mitsubishi attacks these preeedents by pointing out that the selection of a jury verdict form is a matter of discretion of the Trial Court, the exercise of which "has never been held to be error." (M-Pet. 8, n.5). Mitsubishi argues that this fact somehow is in conflict with the Federal Circuit's requirement that Mitsubishi timely object to the verdict form

as a prerequisite for invoking the multiple-claims-single-verdict ground for new trial (M-Pet. 3).

Mitsubishi's premise is incorrect. The Trial Court's decisions concerning the jury form ***are*** reviewable for abuse of discretion. Consequently, as the Federal Circuit here correctly noted, "to avoid possible waiver on subsequent appeal, the objection to the form or content of special interrogatories must be made before the jury is discharged" (App. 8a) (citing 9 James Wm. Moore et al., *Moore's Federal Practice* ¶ 49.20[5] (3d ed. 1997)).

Mitsubishi relies (M-Pet. 8, n.5) on 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2505, at 164-165 (2d ed. 1995), which states: "there ought never be a reversal for use or nonuse of special verdicts." With due respect to the authors of this treatise, the actual authorities contradict the notion that the Trial Court is immune from review in this regard. Indeed, in *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365 (9th Cir. 1987) the Court held that the Ninth Circuit applied the normal "abuse of discretion" standard, and specifically reviewed the Trial Court's choice of jury form under that abuse of discretion standard.

And as held in *Railroad Dynamics, Inc. v. A. Stucki Co.*, 727 F.2d 1506, 1515 (Fed. Cir. 1984) (emphasis added):

> District Courts have broad authority and discretion in controlling the conduct of a trial. That authority extends to the form by which juries return verdicts, Fed. R. Civ. P. 49, and will not be interfered with unless an ***abuse of discretion*** is shown.

Consistent with this abuse of discretion standard, Courts have repeatedly held that review of a Trial Court's choice of jury form for abuse of discretion is barred if the objecting party waives its objection by failing to properly preserve it in the Trial Court below.[10]

Just as important, the conclusion Mitsubishi would draw does not follow from its premise, even were that premise correct. Whether or not a Trial Court's choice of verdict form is reviewable for error, is not the issue. As the authorities discussed *supra* make clear, a party will not be permitted to take advantage of uncertainties in the verdict form that it could have avoided and may even have fostered. One seeking to rely upon a multiple-claims-single-verdict ground for new trial on appeal must have taken action to alert the Trial Court to the perceived problem by objecting to the form of verdict. The facts of this case and the authorities of the Circuits establish that waiver applies four-square to Mitsubishi's multiple-claims-single-verdict argument here.

Requiring a party to object to the verdict form as a prerequisite to invoking the multiple-claims-single-verdict ground for a new trial serves the very policy considerations that Mitsubishi invokes. Mitsubishi expresses concern for "the uncertainty of the basis for a general verdict" (M-Pet. 9). The rule ensures that a party will register an objection to verdict forms it perceives as flawed, allowing the Court to correct the alleged problem if necessary. Far from "inherent uncertainty" being present "regardless of

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10. *Dixson v. Newsweek, Inc.*, 562 F.2d 626, 631 (10th Cir. 1977); *Toth v. Corning Glass Works*, 411 F.2d 912, 914 n.2 (6th Cir. 1969); *Burgess v. Premier Corp.*, 727 F.2d 826, 831 (9th Cir. 1984); *Kloepfer v. Honda Motor Co.*, 898 F.2d 1452, 1456 (10th Cir. 1990); *Geneva County Bd. of Educ. v. CNA Ins. Co.*, 874 F.2d 1491, 1497 n.6 (11th Cir. 1989).

whether an objection has been made," (M-Pet. 9), requiring objections reduces any uncertainty that might otherwise result.

Nor does the Federal Circuit's holding have any adverse impact on the statutory presumption of validity, as Mitsubishi balefully predicts (M-Pet. 9). If anything, that holding encourages parties to raise at the Trial Court level the appropriateness of jury form questions on validity.

III. THE FEDERAL CIRCUIT'S HOLDING OF WAIVER RAISES NO SEVENTH AMENDMENT CONCERNS

Despite the substantial precedent supporting the Federal Circuit's waiver holding, Mitsubishi argues that somehow the Federal Circuit has curtailed Mitsubishi's Seventh Amendment right to a trial by jury (M-Pet. 3, 10-11). The application of waiver to the circumstances here, however, is no more in derogation of Mitsubishi's rights than is the application of waiver under Rule 38, Fed. R. Civ. P., as to requests for jury trials; Rule 49, Fed. R. Civ. P., as to special verdicts; or Rule 51, Fed. R. Civ. P., as to jury instructions. As the Federal Circuit has held, the Seventh Amendment assures a party of the right to a jury ***trial***, not a jury ***verdict***. *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 763 (Fed. Cir. 1988).

For example, Fed. R. Civ. P. 38(d) provides:

> The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury.

This Court has upheld waiver of the right to a jury trial under this rule. *United States v. Moore*, 340 U.S. 616, 621, 71 S. Ct. 524, 527, 95 L. Ed. 2d 582 (1951).

Likewise, Rule 49(a), Fed. R. Civ. P., on which Mitsubishi relies (M-Pet. 8, n.5), provides (emphasis added):

> If . . . the court omits any issue of fact . . . each party ***waives*** the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury.

The Circuits uniformly apply this rule, notwithstanding the Seventh Amendment right to trial by jury.[11] As held in *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 918 (1st Cir. 1988) (citations omitted):

> It is well settled that a litigant who accedes to the form of a special interrogatory will not be heard to complain after the fact. If a slip has been made, the parties detrimentally affected must act expeditiously to cure it, not lie in wait and ask for another trial when matters turn out not to their liking.

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11. *Putnam Resources v. Pateman*, 958 F.2d 448, 456-57 (1st Cir. 1992) ("In the Rule 49(a) context, a failure to object to omissions in interrogatories constitutes a waiver of jury trial on those issues."); *International Meat Traders, Inc. v. H & M Food Sys.*, 70 F.3d 836, 840-41 (5th Cir. 1995) ("By failing to challenge the jury verdict form at the appropriate time, [plaintiff] effectively has waived its right to raise the issue on appeal."); *Burgess*, 727 F.2d at 831 ("[U]nder Fed. R. Civ. P. 49(a) a party waives its right to demand submission of a special verdict question on an issue unless it objects to the failure to submit the special question before the jury retires."); *Kloepfer*, 898 F.2d at 1456.

Thus, Rule 49, far from supporting Mitsubishi, stands for the proposition that the right to jury trial, which Mitsubishi (incorrectly) says it was deprived of here, is waivable.

Furthermore, the Federal Circuit's waiver holding is consistent with Fed. R. Civ. P. 51, which provides:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

This Rule is in accord with long-standing precedent of this Court, that a party waives the right to appeal the manner that a Trial Court presents the issues to the jury if a timely objection is not made. *Palmer v. Hoffman*, 318 U.S. 109, 119, 63 S. Ct. 477, 483, 87 L. Ed. 645 (1943); *City of Springfield v. Kibbe*, 480 U.S. 257, 258-59, 107 S. Ct. 1114, 1115, 94 L. Ed. 2d 293 (1987). As stated in *Palmer*, 318 U.S. at 119, 63 S. Ct. at 483:

> In fairness to the trial court and the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error.

The Circuits have uniformly held that Rule 51 is applicable to the choice and content of the jury form submitted to the jury. *Hoechst*, 78 F.3d at 1581; *Neely v. Club Med Management Servs., Inc.*, 63 F.3d 166, 200 (3d Cir. 1995); *Play Time, Inc. v. LDDS Metromedia Communications, Inc.*, 123 F.3d 23, 29 n.6 (1st Cir. 1997); *In re Innovative Constr. Sys., Inc.*, 793 F.2d 875, 882 (7th Cir. 1986).

CONCLUSION

Mitsubishi's Petition for a Writ of Certiorari should be denied. The Federal Circuit's holding that Mitsubishi waived any right to rely on a multiple-claims-single-verdict ground on appeal correctly applied well established precedent, and does not meet the strict standards that this Court applies when considering whether a Writ of Certiorari should be granted.

Respectfully submitted,

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